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SCOPE OF GOVERNOR'S CALL AS CONSTITUTIONAL LIMITATION ON BUSINESS OF SPECIAL SESSION OF THE LEGISLATURE

I. INTRODUCTION

The years since World War II have been characterized by a mounting pressure on state legislatures to produce solutions to difficult problems on a moment's notice. One manifestation of this increased pressure has been a rise in the frequency of legislative special sessions called by the governor.¹

The fact that states have been forced to turn to this device with some regularity in recent years makes appropriate the consideration of a state constitutional problem peculiar to the operation of a special session: the permissible scope of legislative business at special sessions.

It is clear that in states having no specific limitation in their constitutions, the legislature has the same range of powers at a special session as it has at the regular session.² But the majority of states have constitutional provisions³ limiting legislative business at special sessions to consideration of matters brought to the legis-

¹ Not only has the special session been increasingly frequent, but many states have turned to annual sessions and budget sessions in order to get their legislative work done. See generally, Zeller, *American State Legislatures* (Report of the Committee on American Legislatures, American Political Science Association) 89-93 (1954).

² 1 SUTHERLAND, *STATUTORY CONSTRUCTION* § 501 (3rd ed. 1943); *Woessner v. Bullock*, 176 Ind. 166, 93 N.E. 1057 (1911); *State v. Fair*, 35 Wash. 127, 76 Pac. 731 (1904).

³ Typical constitutional provisions are those of Pennsylvania ("When the General Assembly shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session . . .") and Colorado ("The Governor may, on extraordinary occasions convene the general assembly, by proclamation, stating therein the purpose for which it is to assemble; but at such special session no business shall be transacted other than that specially named in the proclamation . . .") PA. CONST. art. 3, § 25; COLO. CONST. art. IV, § 9.

In a few states legislative action outside the call is permissible if passed on by a two-thirds majority. ALA. CONST. art. 4, § 76 provides: "When the legislature shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the governor calling the session, except by a vote of two-thirds of each house."

lature's attention by the governor, either in his proclamation calling the session or by subsequent special message.⁴

The purpose of the provision is basically twofold. First, the provision embodies the idea that since the special session is often an unforeseeable occurrence made necessary by a sudden change in circumstances, the public should be provided with notice of what subjects will be before the legislature so that interested parties may present their views.⁵ Second, since the special session is by nature an "extraordinary occasion,"⁶ requiring immediate legislative action, the provision has the effect of forcing the legislature to refrain from clogging its channels of business with less important matters.⁷ That the purpose of the provision is not merely a matter of intra-governmental mechanics and is primarily for the protection of the public is indicated by the fact that subsequent ratification by the governor of legislative enactments will not validate them if their content was not a subject included within the original call to special session.⁸

Though it may be reasonably obvious that the practical effect⁹ of the provision should be to restrain the legislature from passing

⁴ States having a constitutional provision limiting the scope of legislative business at special sessions to "subjects" or "objects" stated in the call: ALA. CONST. art. 4, § 76; ALASKA CONST. art. II, § 9; ARIZ. CONST. art. 4, pt. 2, § 3; ARK. CONST. art. 6, § 19; CAL. CONST. art. 5, § 9; COLO. CONST. art. IV, § 9; FLA. CONST. art. 4, § 8; GA. CONST. art. V, § 2-3012; IDAHO CONST. art. 4, § 9; ILL. CONST. art. V, § 8; KY. CONST. § 80; LA. CONST. art. 5, § 14; MICH. CONST. art. IV, § 28; MO. CONST. art. 3, § 39(7); MISS. CONST. art. 5, § 121; MONT. CONST. art. VII, § 11; NEB. CONST. art. 4, § 8; NEV. CONST. art. 5, § 9; N.M. CONST. art. IV, § 6; N.Y. CONST. art. 4, § 3; OHIO CONST. art. III, § 8; OKLA. CONST. art. 6, § 7; PA. CONST. art. 3, § 25; TENN. CONST. art. 3, § 9; TEX. CONST. art. 3, § 40; UTAH CONST. art. VII, § 6; W. VA. CONST. art. VII, § 7; WIS. CONST. art. 4, § 11.

⁵ *Trenton Graded School Dist. v. Board of Educ. of Todd County*, 278 Ky. 607, 129 S.W.2d 143 (1939); *Jones v. State*, 151 Ga. 507, 107 S.E. 765 (1921); "[T]he constitutional provision was designed to protect any department or division of the Government, but to protect the people themselves . . ." *Hutcheson, J.*, dissenting in *Shadrack v. Bledsoe*, 186 Ga. 345, 198 S.E. 535 (1938); 1 SUTHERLAND, *STATUTORY CONSTRUCTION* § 502 (3d ed. 1943).

⁶ N.Y. CONST. art. 4, § 3 provides: "[The Governor] shall have power to convene the legislature, or the senate only, on *extraordinary occasions*." (Emphasis added).

⁷ *Richmond v. Lay*, 261 Ky. 138, 87 S.W.2d 134 (1935); *Smith v. Curran*, 268 Mich. 366, 256 N.W. 453 (1934).

⁸ 2 *Long v. State*, 58 Tex. Crim. 209, 127 S.W. 208 (1910); *Wells v. Missouri Pac. R.R.*, 110 Mo. 286, 19 S.W. 530 (1892).

laws in areas not suggested by the governor, proper application of the provision to specific cases is not conducive to easy solution. As in many other areas of constitutional law, the rules in this area have developed through a process of judicial inclusion and exclusion. But even more so than in other constitutional areas, an examination of the cases, wherein courts were faced with the question of whether the subject of a particular piece of legislation was within the call, reveals a surprising lack of agreement as to what the proper approach should be.¹⁰ Though at least one court has purported to find in the provision a clearly defined mandate for judicial action, most have not.¹¹ Sometimes, of course, there is no doubt that a law passed was not comprehended by the governor's call. Thus in a case where the call was for "legislation to provide additional state revenues" and the legislature passed an act creating a state crime commission, the court held the act outside the call and unconstitutional.¹² Usually, however, the court's task is not so simple.¹³

Various canons of construction and general rules of interpretation have been developed to reach, or justify, as the case may be, conclusions as to the validity of particular enactments under particular calls.¹⁴ Though these "tests" are by necessity general in their terms and do not eliminate the necessity for careful analysis of *all* the language involved (both in the act and in the call), they provide some direction. Also, examination of the cases shows two rather well defined judicial points of view regarding the proper interpretation of the call. Consideration of these views, together with the above mentioned canons of construction, or "tests," provides a foundation upon which most of the cases can be reconciled.

Of course, the reader will be concerned as to the effect of specific constitutional language on results in a given jurisdiction. As a rule, differences in terminology are not significant enough to allow distinctions to be drawn between cases on this basis.

⁹ For a further discussion of the purpose and practical effects of the provision, see *infra*, Section VI.

¹⁰ "Perusal of the authorities touching upon the legislative prerogative under calls to special session leads to the conclusion that . . . the extreme cases either way seem to be irreconcilable . . ." *State Tax Comm'n v. Preece*, 1 Utah 2d 337, 339, 266 P.2d 757, 759 (1954).

¹¹ *Adams v. Noble*, 103 Miss. 393, 60 So. 561 (1913).

¹² *State v. Schoonover*, 124 S.E.2d 340 (W.Va. 1962).

¹³ *State ex rel. Nat'l Conservation Exposition Co. v. Woollen*, 128 Tenn. 456, 161 S.W. 1006 (1913).

¹⁴ 1 SUTHERLAND, STATUTORY CONSTRUCTION §§ 501-09 (3d ed. 1943).

Judicial interpretation has rendered such terms as "object," "subject," "subject-matter," and "general purpose" equivalents. The terms have been used interchangeably by the courts with decisions of other jurisdictions being quoted and relied upon without regard to the wording of the particular constitutional provision involved.¹⁵

II. "TESTS" OF VALIDITY UNDER THE CALL

While in a sense it seems inappropriate to speak of "tests" when really all that is involved is a judgment as to whether one subject (or subjects) comprehends another, that word does serve to characterize the various forms of logic utilized by courts in determining whether the governor's call has been exceeded. Since there is virtual unanimity among courts that these tests correctly represent the law governing the interpretation of the governor's call, it should suffice at this point to present them with a minimum of discussion. They should, however, be stored for future reference.

First, to be valid under the call, the legislative enactment must, under the universal rule, be "germane"¹⁶ or "related to"¹⁷ the call. Conversely, if the legislative act has no reasonable relevance to the subject matter proposed by the governor, it is unconstitutional and void.¹⁸ Whether the "germane" tests has been met is of course entirely dependent upon the facts of the situation.

Second, all courts agree that the call cannot be used by the governor to inhibit legislative discretion.¹⁹ In other words, though the legislature may be limited in its field of action to the subjects

¹⁵ "Comparing [cases from several jurisdictions] we see no substantial difference in the constitutional limitations upon legislative power. They all provide that the governor may confine the legislature, called in special session, to such subjects of legislation as he may prescribe . . ." *State ex rel. Nat'l Conservation Exposition Co. v. Woollen*, 128 Tenn. 456, 487, 161 S.W. 1006, 1014 (1913).

¹⁶ *In re Opinion of the Justices*, 94 Colo. 215, 29 P.2d 705 (1934); *Blackford v. Judith Basin County*, 109 Mont. 578, 98 P.2d 872 (1940); *Commonwealth ex rel. Schnader v. Liveright*, 308 Pa. 35, 161 Atl. 697 (1932).

¹⁷ *Shadrack v. Bledsoe*, 186 Ga. 345, 198 S.E. 535 (1938).

¹⁸ *Smith v. Curran*, 268 Mich. 366, 256 N.W. 453 (1934); *State ex rel. Nat'l Conservation Exposition Co. v. Woollen*, 128 Tenn. 456, 161 S.W. 1006 (1913).

¹⁹ "All the cases agree that, while the governor may so limit the subjects of legislation, he cannot dictate to the legislature the special legislation which they shall enact on those subjects." *State ex rel. Nat'l Conservation Exposition Co. v. Woollen*, 128 Tenn. 456, 487, 161 S.W. 1006, 1014 (1913). See also *Blackford v. Judith Basin County*, 109 Mont. 578, 98 P.2d 872 (1940); *Annenberg v. Roberts*, 333 Pa. 203, 2 A.2d 612 (1938); *State Tax Comm'n v. Preece*, 1 Utah 2d 337, 266 P.2d 757 (1954).

submitted, it need not follow the governor's advice as to *how* a given subject should be handled.²⁰ Any stipulation made by the governor as to what procedure should be followed in dealing with a subject is advisory only.²¹ Thus the governor may not, under the guise of naming a subject, limit its scope so drastically that he in effect imposes upon the legislature his own view of what policy should be adopted.²²

Third, the general principle is found in nearly all decisions that the limitation on the scope of the legislature's business should be construed in favor of legislative power.²³ And finally, the legislative enactment is presumed to be valid and the burden of proof is on the person attacking the law to show its constitutional defect.²⁴

At this point it becomes apparent why all courts seem to agree on these tests. Identical fact situations could reach opposite results with both courts dutifully applying every one of the tests. The problem is to find a means of expressing, in concrete language, the relationship between two abstractions (the "subject" designated in the call and the "subject" of legislative action). Many of the expressions used seem to lead, at least in a philosophical sense,

²⁰ *Commonwealth ex rel. Schnader v. Liveright*, 308 Pa. 35, 57, 161 Atl. 697, 703 (1932): "While the legislature must confine itself to the matters submitted, it need not follow the views of the governor or legislate in any particular way."

²¹ *McCarroll v. Clyde Collins Liquors*, 198 Ark. 896, 132 S.W.2d 19 (1939); *Martin v. Riley*, 20 Cal. 2d 28, 123 P.2d 488 (1942); *Williams v. MacFeeley*, 186 Ga. 145, 197 S.E. 225 (1938); *Smith v. Curran*, 268 Mich. 366, 256 N.W. 453 (1934); *Sweeney v. City of Butte*, 64 Mont. 230, 208 Pac. 943 (1922); *Chicago B. & Q.R.R. v. Wolfe*, 61 Neb. 502, 86 N.W. 441 (1901); *People ex rel. Buffalo & Fort Erie Pub. Bridge Auth. v. Davis*, 277 N.Y. 282, 14 N.E.2d 74 (1938); *Ex parte Fulton*, 86 Tex. Crim. 149, 215 S.W. 331 (1919); *Long v. State*, 58 Tex. Crim. 209, 127 S.W. 208 (1910); *State Tax Comm'n v. Preece*, 1 Utah 2d 337, 266 P.2d 757 (1954); *State Road Comm'n v. West Va. Bridge Comm'n*, 112 W.Va. 514, 166 S.E. 11 (1932).

²² *Commonwealth ex rel. Schnader v. Liveright*, 308 Pa. 35, 161 Atl. 697 (1932). Also see generally cases cited note 21 *supra*.

²³ 1 SUTHERLAND, *STATUTORY CONSTRUCTION* § 507 (3d ed. 1943); *Board of Regents of Univ. of Ariz. v. Sullivan*, 45 Ariz. 245, 42 P.2d 619 (1935); *State v. Versluis*, 58 Ariz. 368, 120 P.2d 410 (1941); *City of Edwardsville v. Jenkins*, 376 Ill. 327, 33 N.E.2d 598 (1941); *State v. Smith*, 184 La. 263, 166 So. 72 (1935); *Adams v. Noble*, 103 Miss. 393, 60 So. 561 (1913); *In re Platz*, 60 Nev. 296, 108 P.2d 858 (1940); *Pittsburg's Petition*, 217 Pa. 227, 66 Atl. 348 (1907); *Appeal of Van Dyke*, 217 Wis. 528, 259 N.W. 700 (1935).

²⁴ *State v. Schoonover*, 124 S.E.2d 340 (W.Va. 1962).

only to questions rather than answers. One asks, "How germane must the legislature's business be to that proposed by the governor?" Or, "How closely related to the subject matter in the call must the legislation be?" One court expressed the matter this way:²⁵

If it be competent for the governor, after the general manner attempted, to authorize the general assembly to select for itself the subject-matter of legislation and enact laws accordingly, then it is equally permissible for him, in his proclamation, to say that the General Assembly is called in special session 'To enact any and all legislation relating to or in any wise affecting the qualified voters of the state, or the taxpayers of the state, or the citizens of the state,' and thus the door is opened wide for general legislation at a special session. The sole difference between these suggestions and the designation which the governor actually did make, is one of degree; there is absolutely none in character or kind.

That the question is, in the final analysis, one of degree is of course no more a complete answer than are statements to the effect that laws passed at special sessions must be "germane" to the call or "related to" the subject matter proposed. But the observation that the matter is one of degree does serve to indicate the necessity for discussion of a few illustrative fact situations in the setting of the exact constitutional language involved.²⁶ Such a discussion will show not only that the tests listed above work better in practice than in theory, but will also illustrate the two divergent views on the proper interpretation of the call.

III. THE MAJORITY VIEW

A good starting point for analysis of the case law dealing with the governor's call as a constitutional limitation on legislative power is an early Colorado case, *Denver & R.G.R.R. v. Moss*.²⁷ In *Moss* a call²⁸ to special session requested the legislature "To enact any and all legislation relating to or in any wise affecting corporations, both foreign and domestic, of a quasi-public nature."²⁹ The Colorado General Assembly, meeting pursuant to this call, passed an act defining the liability of railroads for killing live stock. The

²⁵ *Denver & R.G.R.R. v. Moss*, 50 Colo. 282, 286, 115 Pac. 696, 697 (1911).

²⁶ As pointed out earlier, the slight differences in constitutional language have not had a significant impact on the results of litigation. See note 15 *supra*. The applicable language will be included, however, as various cases are discussed.

²⁷ 50 Colo. 282, 115 Pac. 696 (1911).

²⁸ The call included a number of subjects but the quoted matter was the only part deemed by the court to be even arguably relevant to the legislation attacked as being outside the call.

²⁹ 50 Colo. 282, 284, 115 Pac. 696, 697 (1911).

act was adjudged unconstitutional by the Colorado Supreme Court as outside the governor's call.³⁰ The basic reason for the act's invalidity was that the call of the governor was *too broad*. The court admitted that it was "all too true" that the proclamation was broad enough to admit the act in question; but in its view the constitution required the governor to do more than merely open up an area by designating a class which should be regulated. Rather the governor's obligation was to name some "special subject-matter." The effect of the proclamation in the court's opinion was to leave to the legislature to determine for itself what the subject of legislation would be as long as the result was to "affect corporations." This amount of discretion, the court felt, was not available to the legislature at a special session.³¹

The meaning of the *Moss* decision is brought into sharper focus by comparing it with an earlier Nebraska case involving a somewhat similar fact situation: *Chicago B. & Q.R.R. v. Wolfe*.³² In *Wolfe* the legislature was called into special session to consider "The revision or amendment of the general incorporation law." At that session a law was passed "defining the duties and liabilities of railroad companies." This act was found to be within the governor's call.

The *Moss* opinion distinguished *Wolfe* on the ground that the proclamation of the Nebraska governor "particularly pointed out and named" the subject of legislation, while the call before it accomplished no more than the designation of a class to be subjected to legislative regulation.³³ It is difficult to see what the court was driving at by this finding that the calls were basically different because one particularly pointed out a subject while the other did not. In the one instance (*Moss*), the governor asked for legislation

³⁰ COLO. CONST. art. IV § 9 provides: "The governor may, on extraordinary occasions convene the general assembly, by proclamation, stating therein the purpose for which it is to assemble; but at such special session no business shall be transacted other than that specially named in the proclamation."

³¹ "If the governor may empower the legislature, in the face of the constitution, to enact any and all legislation, by merely pointing out the person, class or interest to be affected thereby, instead of specially naming the subject-matter of legislation, then the constitutional provision is utterly disregarded, and its main and most wholesome and salutary purpose, that of confining legislation to the specific subject-matter concerning which an emergency is believed to exist, completely nullified." 50 Colo. at 286-87, 115 Pac. at 697.

³² 61 Neb. 502, 86 N.W. 441 (1901).

³³ 50 Colo. at 288, 115 Pac. at 698.

"in any wise affecting corporations." In the other, the subject submitted was "revision or amendment of the general incorporation law." Both of these calls presented a general "subject" having to do with corporations.³⁴

The result reached in *Moss* can be reconciled with that of *Wolfe*, however—albeit on a different rationale than used by the court. The two cases exemplify the liberal (*Wolfe*) and strict (*Moss*) views of the proper function of the governor's call.

The majority or liberal construction of the governor's call adheres most strongly to the doctrine that the legislative prerogative should be upheld if this can be done through any reasonable construction of the call.³⁵ Courts of this persuasion have been inclined to uphold a legislative act taken at special session if *the governor did so much as mention the subject matter in his call*.³⁶

Thus in *Shadrick v. Bledsoe*³⁷ the call included as objects of proposed legislation, "taxation and revenue of all kinds, laws pertaining to contraband or outlawed goods, nuisances, and practices of professions, businesses, and trades, and penal laws."³⁸ The legislature passed an act repealing the state's prohibition law and providing for taxation and sale of liquor under local option. The court held this act within the call. The test used by the majority opinion was that the legislation must be "related to" the subjects set forth in the governor's call.³⁹ Note how broad this decision is. As pointed out by the dissenting judge, the only possible justification for the act under the call was the object of raising revenue.⁴⁰ But even if it were conceded that the call was broad enough to

³⁴ A like view was expressed by Hill J., dissenting in *Moss*: "[I] am unable to appreciate wherein the difference or distinction is to be found in a call which provides for the revision or amendment of the general incorporation laws, and one which calls for laws affecting such corporations . . ." 50 Colo. at 302, 115 Pac. at 702.

³⁵ *In re Platz*, 60 Nev. 296, 108 P.2d 858 (1940).

³⁶ *Baldwin v. State*, 21 Tex. Ct. App. R. 591, 3 S.W. 109 (1886).

³⁷ 186 Ga. 345, 198 S.E. 535 (1938).

³⁸ *Id.* at 345, 198 S.E. at 536.

³⁹ GA. CONST. art. V, § 2-3012 states: "The Governor shall have power to convoke the General Assembly on extraordinary occasions, but no law shall be enacted at called sessions of the General Assembly, except such as shall relate to the objects stated in his proclamation convening them . . ."

⁴⁰ *Hutcheson, J.*, dissenting in *Shadrick v. Bledsoe*, 186 Ga. 345, 198 S.E. 535 (1938).

include any revenue statute, the law seems to fall outside the range of topics listed by the governor. The decision certainly represents the liberal view that mere mention of the general subject matter in the call is enough. (This is true regardless of the emphasis one chooses to place on the constitutional language—cited by the court as more permissive in Georgia than in some states.⁴¹)

The liberal view was likewise followed in the Louisiana case of *State v. Smith*.⁴² The call to special session asked for consideration of, among other matters, "Appointment and election of public officers." At the session a law was passed dealing not only with the appointment and election of various officers, but also with the creation of *additional* positions for police jurors. The court held that the power to act on the appointment and election of public officers included the right to *create* offices.⁴³

In *State Road Comm'n v. West Virginia Bridge Comm'n*,⁴⁴ the call requested:⁴⁵

Revision of salaries paid all public officials now fixed or authorized by general or special statute. [and for] An emergency revenue measure to balance the state budget, and to raise an additional sum of five hundred thousand dollars, or such part thereof as may be deemed proper, to be applied to the relief of the unemployment over a specified period . . . such revenue to be raised by indirect taxation by a special tax on cigarettes and/or other forms of tobacco and other luxuries, no part of the revenue for such purposes to be raised by a direct property tax.

The legislature enacted a measure, over the governor's veto, abolishing the West Virginia Bridge Commission and transferring its function to the state road commission. The court found the act to be within the call, reasoning that since the "purpose" of the call was to save money and balance the budget—and since lowering salaries was only a suggested means to this end—the abolishment

⁴¹ See note 39 *supra*. The majority in *Shadrick v. Bledsoe* maintained that the Georgia provision is more liberal than in some states which require legislative business to be related to objects "specifically" stated in the call.

⁴² 184 La. 263, 166 So. 72 (1935).

⁴³ LA. CONST. art. 5, § 14 provides: "The power to legislate, under the penalty of nullity, shall be limited to the objects specially enumerated in the proclamation of the Governor, or petition and notice, convening such extraordinary session"

⁴⁴ 112 W.Va. 514, 166 S.E. 11 (1932).

⁴⁵ *Id.* at 517, 166 S.E. at 13.

of an office fit within the call as the legislature's way to save money.⁴⁶

In a California case implementing the liberal view, an act which completely reorganized the California State Guard was held within a call requesting the legislature to consider "augmenting the appropriation" for the operation, maintenance and organization of the State Guard.⁴⁷ The court said that when the governor has submitted a subject to the legislature, "the designation of that subject opens for legislative consideration matters relating to, germane to and having a natural connection with the subject proper."⁴⁸

Finally, in *Baldwin v. State*,⁴⁹ where the call was for legislation to reduce taxation, and the legislature imposed a new tax on a new subject, the act was upheld by the court on the theory that the whole subject of taxation was before the legislature.⁵⁰

Summarizing the lessons to be drawn from these cases, it should be first reiterated that *all* courts agree that the legislature may not pass laws at special sessions which are not "germane" to, "related to" or "having a rational connection with" subjects stated in the call.⁵¹ Where the disagreement is, and where, it is submitted, there lies a liberal and narrow view, is in the breadth of construction to be given the call. The liberal, and the majority, position is represented by the cases just discussed holding that the mere mention of a subject in the call opens up that subject entirely. Thus in the

⁴⁶ W. VA. CONST. art. VII, § 7 provides: "The Governor may on extraordinary occasions convene, at his own instance, the Legislature; but when so convened it shall enter upon no business except that stated in the proclamation by which it was called together."

⁴⁷ *Martin v. Riley*, 20 Cal. 2d 28, 123 P.2d 488 (1942).

⁴⁸ *Id.* at 39, 123 P.2d at 495. The pertinent California constitutional provision recites that the Governor "may, on extraordinary occasions, convene the Legislature by proclamation, stating the purposes for which he has convened it, and when so convened it shall have no power to legislate on any subjects other than those specified in the proclamation" CAL. CONST. art. 5, § 9.

⁴⁹ 21 Tex. Ct. App. R. 591, 3 S.W. 109 (1886).

⁵⁰ TEX. CONST. art. 3, § 40 provides: "When the Legislature shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session, or presented to them by the Governor; and no such session shall be of longer duration than thirty days."

⁵¹ *State Tax Comm'n v. Preece*, 1 Utah 2d 337, 266 P.2d 757 (1954); 1 SUTHERLAND, STATUTORY CONSTRUCTION § 508 (3d ed. 1943).

Baldwin case, *supra*, a call to lower taxes would introduce the whole subject of taxation, and the legislature would be free to raise taxes.⁵²

IV. THE MINORITY VIEW

The position of a minority of courts taking a narrow or strict view of the call is that the subject matter amenable to legislative action must be restricted within the actual confines of the governor's words. That is, though the governor designates a general subject in his call, he may restrict the business which the legislature may properly consider to a *specific branch* of that general subject.⁵³

The leading case espousing this position is *State ex rel. National Conservation Exposition Co. v. Woollen*.⁵⁴ The call there was for legislation "to make such appropriation of the public moneys as may be deemed necessary and proper to maintain the state's institu-

⁵² Other cases representing the majority view are: *State Tax Comm'n v. Preece*, 1 Utah 2d 337, 266 P.2d 757 (1954) (Call asked for legislation in the area of "school retirement and finance" but expressly negated any imposition of new or higher taxes. Act was passed allocating more money to the state school system, to be financed by increasing the excise tax on cigarettes. *Held*: within the call); *Annenberg v. Roberts*, 333 Pa. 203, 2 A.2d 612 (1939) (A call to consider "making illegal the use of devices or methods of transmission of information or advices in furtherance of gambling was *held* to authorize the creation by the legislature of a commission to investigate gambling in the state. The court said that the call "inferentially permitted" the legislation); *Blackford v. Judith Basin County*, 109 Mont. 578, 98 P.2d 872 (1940) (A call of the governor requesting amendment of the law "in relation to the time for redeeming real estate from tax liens" was *held* to authorize an act which did not actually extend the time of redemption from tax liens, but did afford relief by enabling the former owner to buy back his property for the amount of the taxes); *Long v. State*, 58 Tex. Crim. 209, 127 S.W. 208 (1910) (Law changing the terms and times of sessions of certain state courts was *held* to be within a call for consideration of laws "simplifying the procedure in both civil and criminal courts.") *Accord*, *McCarroll v. Clyde Collins Liquors, Inc.*, 198 Ark. 896, 132 S.W.2d 19 (1939); *People ex rel. Griffin v. City of Chicago*, 382 Ill. 500, 48 N.E.2d 329 (1943); *People ex rel. Buffalo & Fort Erie Pub. Bridge Auth. v. Davis*, 277 N.Y. 292, 14 N.E.2d 74 (1938); *State ex rel. Ach v. Braden*, 125 Ohio St. 307, 181 N.E. 138 (1932); *Kemp v. State*, 35 Okla. Crim. 128, 248 Pac. 1116 (1926); *Commonwealth v. Liveright*, 308 Pa. 35, 161 Atl. 697 (1932); *Corn v. Fort*, 170 Tenn. 377, 95 S.W.2d 620 (1936); *Bedford Corp. v. Price*, 112 W.Va. 674, 166 S.E. 380 (1932).

⁵³ *E.g.*, *Sims v. Weldon*, 165 Ark. 13, 263 S.W. 42 (1924). The Governor called special session to act on "the financial distress of the public schools" asking for more money through an income tax or a severance tax. The legislature passed an act imposing a tax on cigarettes. The court found the law void as being outside the call.

⁵⁴ 128 Tenn. 456, 161 S.W. 1006 (1913).

tions, offices and departments.”⁵⁵ The legislature made an appropriation to an “exposition company” created for the purpose of “holding expositions, encouraging and supporting agriculture, industrial enterprises, and the breeding of live stock.” The money was granted to this private concern under a general appropriation bill headed “Department of Agriculture.” The court held that the appropriation to the company was invalid as outside the call, stating that the general authorization to make appropriations of public moneys was qualified by the words “to *maintain* the state’s institutions, offices and departments” and that the legislature was incompetent to make appropriations for other than those purposes stated in the proclamation.⁵⁶ The opinion of the majority included the following statement:⁵⁷

Many subjects may incidentally be referred to in the executive messages upon which no action whatever is required; but it will hardly be claimed that such incidental reference would authorize legislation upon all such subjects at a special session. The evident object, it seems to us, is to restrict legislation at such session to those subjects which the Governor may deem it necessary to legislate upon.

A similar position was taken in a Michigan case, *Smith v. Curran*.⁵⁸ In *Smith* the call asked for legislation validating bonds issued by a municipality “*under sufficient popular vote* regardless of technical requirements.” The legislature passed a statute which permitted validation of bonds issued without legal power, that is *without sufficient popular vote*. The court, holding the law unconstitutional⁵⁹ as outside the call said:⁶⁰

The ‘subject’ submitted in the message was not wholesale validation of bonds. It covered only kinds of bonds which form a logical and natural class for validation, separate and distinct from the other classes also covered [by the act]. While the Governor, within the range of a ‘subject,’ may not restrict the Legislature, he has the

⁵⁵ *Id.* at 457, 161 S.W. at 1007.

⁵⁶ TENN. CONST. art. 3 § 9 provides: “He [the Governor] may, on extraordinary occasions, convene the General Assembly by proclamation, in which he shall state specifically the purposes for which they are to convene; but they shall enter on no legislative business except that for which they were specifically called together.”

⁵⁷ 128 Tenn. 456, 462, 161 S.W. 1006, 1013 (1913).

⁵⁸ 268 Mich. 366, 256 N.W. 453 (1934).

⁵⁹ MICH. CONST. art. IV, § 28 provides: “When the legislature is convened on extraordinary occasions in special session no bill shall be passed on any subjects other than those expressly stated in the governor’s proclamation or submitted by special message.”

⁶⁰ 268 Mich. 366, 256 N.W. 453, 455 (1934).

authority to limit the subject according to his conception of the need for legislation. Thus, a proposal for action upon a certain tax would not throw open the whole matter of taxation for legislation or a recommendation as to a crime would not include the entire realm of criminal law.

There can be little doubt that the court here is saying that the mere mention of a subject does not open it generally to legislation.⁶¹ The court in *Smith*, however, describes its position somewhat differently than was done in *State ex rel. National Conservation Exposition Co. v. Woollen*.⁶² As the quoted portion of the *Smith* opinion shows, the court reasoned that the wholesale validation of bonds was not really the "subject" submitted by the governor; rather, the "subject" submitted was validation of bonds "issued under sufficient popular vote." But saying that the general subject of validating bonds was not the "subject" submitted actually does no more than state a result. It certainly cannot be denied that validation of bonds issued by a municipality was a general subject before the legislature as a result of the call. The crucial question essentially is whether effect is to be given to the *qualification* imposed on that general subject—that is, whether the legislature may validate only those bonds issued under "sufficient popular vote." To this question the *Smith* court answers yes. In so doing it effectively takes a position comparable to that taken in *Woollen*, namely, that the governor may qualify a general subject introduced to the legislature.

*McClintock v. City of Phoenix*⁶³ also illustrates this narrow view. In *McClintock* the legislature passed a law at a special session which purportedly validated proceedings of the city of Phoenix in voting bonds for the acquisition of an armory for the National Guard. The governor's call had asked for consideration of "governmental machinery, state, county and municipal, with a view to more closely coordinating or abolishing certain agencies and activities, and revising expenditures in connection therewith." The act was held to be outside the call.⁶⁴

⁶¹ Language used in both *Smith v. Curran* and *State ex rel. National Conservation Exposition Co. v. Woollen* effectively illustrates the limitations of the "germane," "related to," or comparable tests. It is useless to speak of a subject being "germane" to the call unless it first be determined whether the subject must be "germane" to the call *as qualified*.

⁶² 128 Tenn. 456, 161 S.W. 1006, 1013. (1913)

⁶³ 24 Ariz. 155, 207 Pac. 611 (1922).

⁶⁴ ARIZ. CONST. art. 4, pt.2, § 3 recites: "In calling a special session, the Governor shall specify the subjects to be considered, and at such special session no laws shall be enacted except such as relate to the subjects mentioned in the call."

Once again the court is clearly giving effect to a limitation imposed by the governor on the broad subject matter submitted. The court reasoned that the call to consider "governmental machinery . . . with a view to more closely coordinating, or abolishing certain agencies and activities, and revising expenditures in connection therewith" did not comprehend the power of a city to issue or sell bonds "for any purpose whatever."⁶⁵

Summarizing the minority view, these courts impose a strict construction upon the governor's call to special session in that they uphold the right of the governor to limit the legislature's agenda to certain, specific areas within a general subject.⁶⁶ Thus under this view a call to consider reduction of taxes would *not* authorize the legislature to pass an act raising taxes or imposing a new tax.⁶⁷ Like the courts adopting the liberal position, however, the minority decisions recite that laws must be "germane"⁶⁸ to or "related to"⁶⁹ the call, that the governor may not dictate policy to the legislative branch,⁷⁰ and that legislative enactments are presumptively valid.⁷¹

V. A CURRENT NEBRASKA PROBLEM

As previously indicated, the task of deciding whether a particular piece of legislation is within a particular call—involving as it does the determination of whether one abstraction is relevant to another—is not easy. This is particularly true if the only guides available are the constitutional provision itself and the general notion that the legislation must be "germane" to the call. Specific case precedent is not much help in this area because of the difficulty in finding a prior case where both the legislative act and the call were similar to the ones being construed. There is, of course, precedent in principle, and this is where the two views of the call become relevant. That the use of these views can be of substantial assistance in analyzing the relationship between the call and the subsequent

⁶⁵ 24 Ariz. 155, 156, 207 Pac. 611, 613 (1922).

⁶⁶ *State v. Pugh*, 31 Ariz. 317, 252 Pac. 1018 (1927); *In re Opinion of the Justices*, 94 Colo. 215, 29 P.2d 705 (1934); *State v. Adams*, 323 Mo. 729, 19 S.W.2d 671 (1929); *State ex rel. Carpenter v. City of St. Louis*, 318 Mo. 870, 2 S.W.2d 713 (1928); *Wells v. Missouri Pac. Ry.*, 110 Mo. 286, 19 S.W. 530 (1892).

⁶⁷ *Contra*, *Baldwin v. State*, 21 Tex. Ct. App. R. 591, 3 S.W. 109 (1886).

⁶⁸ *State ex rel. National Conservation Exposition Co. v. Woollen*, 128 Tenn. 456, 161 S.W. 1006 (1913).

⁶⁹ *McClintock v. City of Phoenix*, 24 Ariz. 155, 207 Pac. 611 (1922).

⁷⁰ *Smith v. Curran*, 268 Mich. 366, 256 N.W. 453 (1934).

⁷¹ *Ibid.*

legislation under it is well documented by a current Nebraska problem arising from the following facts.

The Nebraska Legislature, in its regular biennial session in 1963, passed a measure known as Legislative Bill 21,⁷² which, among other things provided for the licensing of nonprofit corporations selling alcoholic liquors for consumption on the premises, and for the licensing of "bottle clubs" by the State Liquor Commission.⁷³ The salient sections of L.B. 21, for present purposes, are those defining "bottle club" and setting their operating procedure, and those defining "nonprofit corporation."⁷⁴

Shortly after the termination of the legislature's regular session, the Governor called the body into extraordinary session.⁷⁵ Even the most cursory reading of the Governor's call, together with his

⁷² Essentially the controversy involves two legislative acts: L.B. 21, passed at the regular 1963 session of the Nebraska Legislature, and L.B. 23, passed at a subsequent session. Both of these bills amended NEB. REV. STAT. § 53-103. (Supp. 1961) and NEB. REV. STAT. § 53-179 (Reissue 1960). The critical effect here, however, is the change made by the two bills in subdivisions (21) and (22) of NEB. REV. STAT. § 53-103 (Supp. 1961). For brevity and clarity, the two acts will be referred to as L.B. 21 (21) and (22) and L.B. 23 (21) and (22).

⁷³ L.B. 21, 73rd Neb. Leg. Sess. (1963): "An Act . . . to define terms: to provide for the licensing of nonprofit corporations for the sale of alcoholic liquors for consumption on the premises; to provide for the licensing of bottle clubs; to provide fees; to provide procedures; to provide exceptions; to authorize the issuance of such licenses outside the limits of any incorporated city or village; to provide to whom liquor may be sold or served under such licenses; to permit the sale or dispensing of alcoholic liquor on Sunday under such licenses; to make certain acts unlawful; to provide penalties . . ."

⁷⁴ Subdivision (21) under L.B. 21 provided: "Nonprofit corporation shall mean a corporation, whether located within any incorporated city or village or not, organized under the laws of this state, not for profit, and which has been exempted from the payment of federal income taxes, as provided by section 501(c) (7) and (8), Internal Revenue Code of 1954." Subdivision (22) read (under L.B. 21): "The words bottle club shall mean an operation, whether formally organized as a club having a regular membership list, dues, officers, and meetings or not, keeping and maintaining premises where persons who have made their own purchases of alcoholic liquors congregate for the express purpose of consuming such alcoholic liquors upon the payment of a fee or other consideration, including among other services the sale of foods, ice, mixes, or other fluids for alcoholic drinks and the maintenance of space for the storage of alcoholic liquors belonging to such persons and facilities for the dispensing of such liquors through a locker system, card system, or any other system." L.B. 21, 73rd Neb. Leg. Sess. (1963).

⁷⁵ The Seventy-fourth (Extraordinary) Session of the Nebraska Legis-

message to the legislature at the outset of the session, reveals that the primary purpose for the extra session was to do something about the problems created by the court's invalidation of statutes fixing interest rates for installment sales.⁷⁶ The call, however, asked for consideration of a number of other matters. Among these, only one, item six in the call, is relevant for purposes here.⁷⁷ In item six the Governor asked for an amendment to L.B. 21, subdivision (21) defining nonprofit corporations eligible for licensing for the sale of alcoholic liquors for consumption on the premises.⁷⁸ It was the Governor's opinion that the failure of subdivision (21) to include veterans' organizations among those nonprofit groups eligible for licensing had been an oversight and resulted in discrimination.⁷⁹

At the special session the legislature made the change requested by the Governor in subdivision (21),⁸⁰ but also made sweeping changes in the operating procedure of bottle clubs described in subdivision (22),⁸¹ tightening considerably the rules applicable to such clubs.

lature convened pursuant to proclamation by the Governor on October 21, 1963. Neb. Legis. Journal, 74th (Extraordinary) Sess., p. 1.

⁷⁶ *Elder v. Doerr*, 175 Neb. 483, 122 N.W.2d 528 (1963). The Governor remarked in his message to the legislature that "the primary purpose for this Call of the Legislature was to consider problems growing out of interest rates statutes invalidated by the Supreme Court of this state." Neb. Legis. Journal, 74th (Extraordinary) Sess., p.7.

⁷⁷ The entire text of the call may be found at pages 2-4 of the Neb. Legis. Journal, 74th (Extraordinary) Sess.

⁷⁸ The Governor's proclamation requested the Legislature to "amend subdivision (21) of section 53-103, Revised Statutes Supplement, 1961, as amended by section 1, Legislative Bill 21, Seventy-third Session, Nebraska State Legislature, 1963, by including those nonprofit corporations which have been exempted from the payment of federal income taxes, as provided by section 501(c) (4), Internal Revenue Code of 1954, within the definition of a nonprofit corporation, thus redefining nonprofit corporations eligible for licensing for the sale of alcoholic liquors for consumption on the premises to include the above described corporations." Neb. Legis. Journal, *supra*, at 3.

⁷⁹ The Governor, in his message, said, "With reference to Legislative Bill 21 of your last session—many of us personally disagree with this law but in view of the fact that it was passed by this body and it is the law of this state, we should not condone meaningless discrimination in the bill as now written. The omission of veterans' organizations as those eligible for consideration as non-profit organizations is an obvious oversight and results in discrimination and, in my opinion, we have an obligation to correct what was, obviously, an oversight at the time the bill was enacted into law." Neb. Legis. Journal, *supra*, at 6.

⁸⁰ L.B. 8, 74th Neb. Leg. Sess. (Extraordinary) (1963).

⁸¹ L.B. 23, 74th Neb. Leg. Sess. (Extraordinary) (1963), changed sub-

The general question raised by these facts is whether the legislature's act in revamping the bottle club law is valid under the call.⁸² More specifically, the issue presented is whether the Governor's request that one section of L.B. 21 be amended threw open all of L.B. 21 for legislative action. Clearly the Governor did not specifically call for any change in the bottle club provisions of L.B. 21, subdivision (22). He asked only for change in subdivision (21) defining nonprofit corporations eligible to serve liquor on the premises. But L.B. 23 (passed at the special session) not only made the minor change sought in (21) but also made broad changes in (22)—substantially rewriting the bottle club law.

First, an attempt must be made to define the subject matter contained in item six of the call.⁸³ Considered narrowly, the "subject" of item six comprehended no more than an amendment to L.B. 21 to include veterans' organizations. But looking at the item from the wider angle, it is equally logical to assert that the real "subject" presented was L.B. 21 in its totality as limited by the suggested amendment thereto. Acceptance of the latter view of the "subject" necessitates a choice between the majority and minority positions—as the result would arguably be different depending upon which

division (22) to read as follows: "The words bottle club shall mean an operation, organized as a club having a membership committee and a regular membership list, keeping and maintaining premises where persons who have made their own purchases of alcoholic liquors congregate for the express purpose of consuming such alcoholic liquors upon the payment of a fee or other consideration, including among other services the sale of foods, ice, mixes, or other fluids for alcoholic drinks and the maintenance of space for the storage of alcoholic liquors belonging to such persons and facilities for the dispensing of such liquors through a locker system or card system; *Provided*, that no person shall be a member of a club until at least five days after submitting his name for membership. Such operation may be conducted by a club as defined in subsection (19) of this section, an individual, partnership, or corporation; as an incident to the operation an accurate and current membership list must be maintained at all times which contains the names and residences of its members, and copies thereof must be filed with the local governing body annually on May 1 and kept available for inspection by duly authorized law enforcement officers and representatives of the Liquor Control Commission. Such club premises shall not be open to the public and shall be available only to club members and their guests." Compare with text of first law, *supra* note 74.

⁸² NEB. CONST. art. 4, § 8 provides: "The Governor may, on extraordinary occasions, convene the legislature by proclamation, stating therein the purpose for which they are convened, and the legislature shall enter upon no business except that for which they were called together."

⁸³ See note 79 *supra*.

was applied. The change in the bottle club provision was certainly "germane" or "related to" the general subject represented by L.B. 21. On the other hand, if as under the minority decisions the language limiting consideration of L.B. 21 to amendment of the designated section is made determinative, the change in the bottle club provision was not "germane" to the call.

Under the majority view it is sufficient that the act be "germane" to the general subject even though that subject be specifically limited.⁸⁴ Here the act was germane to the general subject. Thus, the argument would go, L.B. 23 should be upheld even though arguably not "germane" to the specific provision of L.B. 21 designated by the governor for amendment. Compare, for example, the cases of *Baldwin v. State*⁸⁵ and *Martin v. Riley*⁸⁶ with the instant controversy.⁸⁷ In *Baldwin*, it will be recalled, the general subject of the call was taxation, with the limitation on the legislature being that it should consider a reduction of taxes. Instead the legislature raised taxes. In *Martin* the call generally concerned the State Guard, but this subject was limited by the governor to "augmenting the appropriation" for operation of the Guard. The legislative act having been upheld in both of these cases, they are sound authority on principle for upholding the act in the instant case where the general subject (L.B. 21) was qualified to include only subdivision (21), even though the legislature went farther and rewrote subdivision (22).⁸⁸

Under the minority view the fact that the legislative enactment is germane to some general object in the call does not settle the matter.⁸⁹ The governor may limit the legislature to consideration of a particular branch of the general subject.⁹⁰ Compare the case of *Smith v. Curran*⁹¹ where the call asked for legislation validating bonds issued "under sufficient popular vote" and the legislature passed an act permitting wholesale validation of bonds,

⁸⁴ *Shadrick v. Bledsoe*, 186 Ga. 345, 198 S.E. 535 (1938); *State v. Smith*, 184 La. 263, 166 So. 72 (1935); *State Road Comm'n v. West V. Bridge Comm'n*, 112 W.Va. 514, 166 S.E. 11 (1932).

⁸⁵ 21 Tex. App. 591, 3 S.W. 107 (1886).

⁸⁶ 20 Cal. 2d 28, 123 P.2d 488 (1942).

⁸⁷ See page 613 *supra*.

⁸⁸ For the pertinent constitutional provisions see notes 83, 50 and 48 *supra*.

⁸⁹ *State ex rel. Nat'l Conservation Exposition Co. v. Woolen*, 128 Tenn. 456, 161 S.W. 1006 (1913).

⁹⁰ *Ibid.*

⁹¹ 268 Mich. 366, 256 N.W. 453 (1934).

ignoring the limitation imposed by the governor.⁹² The legislative act having been declared invalid and the specific limitation upheld in *Smith*, the case is authority for the proposition that the Nebraska Legislature exceeded the call when it changed the bottle club provisions of L.B. 21.

As the bottle club example demonstrates, analysis of the Governor's call in terms of the liberal and strict views greatly facilitates solution of the actual case involving a particular enactment under a particular call. Of course application of one or the other of the views can not end judicial inquiry. Such a mechanical approach would obviously be inappropriate in interpreting a constitutional provision which is general in its terms.

There is good reason to believe that the result of the bottle club problem might, under Nebraska law, be an affirmation of the legislative enactment—that is, a finding that the act was within the call. There is no peculiarity in the wording of the Nebraska constitutional provision which would necessitate a different result.⁹³ Nebraska precedent, scant though it is, indicates an inclination to follow the majority view.⁹⁴ Thus in *Chicago B & Q.R.R. v. Wolfe*,⁹⁵ discussed earlier,⁹⁶ the Nebraska court found that a call to consider “the revision or amendment of the general incorporation law” authorized the legislature’s passage of an act “defining the duties and liabilities of railroad companies.” Though the case did not involve the problem of deciding whether to give effect to a specific limitation on a general subject mentioned in the call, the opinion contains broad language to the effect that mention of a general subject is sufficient authorization for any legislation germane thereto, and that the general subject should be given a wide interpretation.⁹⁷

VI. SHOULD LEGISLATURES BE LIMITED AT ALL DURING SPECIAL SESSIONS—A LOOK AT THE “PROS” AND “CONS”

As indicated at the outset, only slightly more than half of the states limit their legislatures at special sessions to subjects desig-

⁹² *Smith v. Curran* is discussed at page 616 *supra*.

⁹³ See note 82 *supra*.

⁹⁴ Only one Nebraska case is of much value for its analysis of the area, that being *Chicago B. & Q. R.R. v. Wolfe*, 61 Neb. 502, 86 N.W. 441 (1901); see generally *State v. Strain*, 152 Neb. 763, 42 N.W.2d 796 (1950); *People ex rel. Tennant v. Parker*, 3 Neb. 409 (1872).

⁹⁵ 61 Neb. 502, 86 N.W. 441 (1901).

⁹⁶ See page 611 *supra*.

⁹⁷ 61 Neb. at 503, 86 N.W. at 442.

nated by the governor in his call.⁹⁸ There is much validity in the argument that the states having no such provision have adopted the wiser policy.⁹⁹ The provisions in many state constitutions were inserted at a time when there was a pervasive fear that a legislature left to its own devices would impose upon the populace a freedom-snatching assortment of unwanted laws.¹⁰⁰ Thus various kinds of procedural checks were cemented into constitutions—of which the limitation on business at special sessions is only one.¹⁰¹ Such a fear of too much legislation does not seem warranted by the facts of state governmental life today. If anything, there is now a fear that the state legislatures are not doing enough and that there has been an unhealthy increase in centralized power at the federal level.¹⁰²

A. THE NATURE OF THE "NOTICE" FUNCTION OF THE CALL

The dominant purpose of the provision limiting the scope of business at special sessions manifestly is to insure public receipt of reasonable notice of matters under legislative consideration. This is the purpose courts try to effectuate in their decisions.¹⁰³ And this is the purpose which is of primary concern in considering the worth of the provision.

The "notice" function of the provision can be most profitably discussed with reference to its limitations. Under this analysis the

⁹⁸ See text accompanying note 4 *supra*.

⁹⁹ An American Political Science Association report took the position that legislative business should not be limited at special sessions but that "the call for special session should be authorized by the governor or by petition of a majority of the legislators, and these special sessions should be permitted to transact any public business whether mentioned in the call or not." AMERICAN POL. SCI. ASS'N COMM. ON AMERICAN LEGISLATURES, AMERICAN STATE LEGISLATURES 109 (Zeller ed. 1954).

¹⁰⁰ See COUNCIL OF STATE GOVERNMENTS, *Table of Effective Dates of State Constitutions* in BOOK OF THE STATES (1958-59).

¹⁰¹ See AMERICAN STATE LEGISLATURES, *supra* note 99.

¹⁰² Expression of this fear has come from many quarters. *E.g.*, PUBLIC ADMINISTRATION SERVICE, MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION (Graves ed. 1960). In the forward to this work the editor quotes Elihu Root's statement that "it is useless for the advocates of state rights to inveigh against the supremacy of the constitutional laws of the United States or against the existence of national authority in the field of necessary control where the States themselves fail in the performance of their duty."

¹⁰³ *State Tax Comm'n v. Preece*, 1 Utah 2d 337, 266 P.2d 757 (1954); *State v. Woolen*, 128 Tenn. 456, 161 S.W. 1006 (1913).

public interest in notice of pending legislation is revealed as a rather weak justification for limiting legislative business.

First, little reason exists for placing the interest of the public in knowing what its legislators are doing at a special session on a higher plane than public interest in legislative progress at regular sessions—at least in this age of instant communication. The interest of the citizen in legislative business is not like that of a stockholder of a corporation. The law protects the stockholder's interest by requiring both the "call" by the board of directors and the notice given to stockholders of a *special* stockholders' meeting to state the specific object or general nature of the business to be transacted.¹⁰⁴ The stockholder has a specifically defined property interest, measured by the value of his stock, in the corporate business while the person to be affected by legislative business has only the interest common to all people in the state.

Furthermore, the notice afforded by the governor's call is different from that rendered by the common constitutional provision requiring the "subjects" or "objects" of legislative acts to be expressed in their titles.¹⁰⁵ The evils sought to be eliminated by requiring expression of subject in the title of a bill are well known. "Log-rolling" was a favorite practice in the early legislative history of most states,¹⁰⁶ with vital rights being affected by legislative acts whose contents were totally irrelevant to their titles.¹⁰⁷

Even though expression of the subject of a law in its title may serve a necessary function in providing notice of the law's contents, it remains that "notice" in this area plays a different role than the "notice" provided in the call. There is no evading the fact that the function of notice in the title of a law is the rather specialized one of preventing the public from being misled and by particular legislative acts, and of preventing the passage of unwise measures by a combination of interests each concerned with only one part of the law. The notice provided by the governor's call, on the other hand, serves no such curative function. Rather, the awards of notice in

¹⁰⁴ BALLANTINE, CORPORATIONS § 171 (2d ed. 1946).

¹⁰⁵ Typical is the Nebraska provision which provides that "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." NEB. CONST. art. III, § 14.

¹⁰⁶ See PUBLIC ADMINISTRATION SERVICE, MAJOR PROBLEMS IN CONSTITUTIONAL REVISION, *supra* note 102.

¹⁰⁷ A discussion of this problem together with several examples may be found in the opinion of the court in *State ex rel. Olson v. Erickson*, 125 Minn. 238, 146 N.W. 364 (1914).

the call are highly speculative in view of the generality of the usual call and the refinement of today's information sources.

B. PRACTICAL ADVANTAGES OF LIMITING THE LEGISLATURE TO THE SCOPE OF THE CALL

Notwithstanding the persuasiveness of arguments that the notice aspect of the call is insufficient justification for limiting the scope of legislative business, the limitation can be defended. There are certain practical considerations indicating that the limitation may have some salutary effects.

First, despite the pressure on legislative assemblies to take on more responsibility, and the necessity for governmental regulation in previously untouched areas, the idea still persists that our political system basically involves *limited government*.¹⁰⁸ State constitutions are replete with evidence of this theory. Among the most fundamental of these, of course, is the proposition that government has only certain specifically delegated powers, with all other authority resting in the hands of the people.¹⁰⁹ Other provisions—for example, the limitation on length of sessions¹¹⁰ and frequency of sessions¹¹¹—support the notion that the legislators have the limited duty to pass necessary laws at certain times and go home. The fact that most legislatures still convene biennially is further evidence of the idea that the legislative process should be used sparingly.¹¹²

Secondly, it would seem that the argument for keeping the legislature within the call is more reasonable in the minority of states which allow their legislatures to call themselves into session.¹¹³ The governor is ordinarily limited in his discretion to call a special session to those circumstances where in his judgment an emergency of some kind exists.¹¹⁴ Though his judgment as to

¹⁰⁸ See AMERICAN STATE LEGISLATURES 109 (Zeller ed. 1954).

¹⁰⁹ E.g., NEB. CONST. art. I, § 26.

¹¹⁰ NEB. CONST. art. IV, § 8.

¹¹¹ NEB. CONST. art. III, § 10.

¹¹² *Ibid.*

¹¹³ Several states now have provision for the legislature's calling itself into special session. Typically this is done through petition of two-thirds of the members. See ALA. CONST. art. 4, § 76.

¹¹⁴ E.g., MISS. CONST. art. 5, § 121 provides that the governor may call a special session "whenever in his judgment, the public interest requires it."

whether conditions do in fact justify a special session is generally not reviewable,¹¹⁵ it cannot be presumed that there is not some pressing business that the legislature should discharge with maximum efficiency and speed. The legislature should not be allowed to ignore the governor's advice that an emergency situation exists while tending to problems submitted by its members even though eventual policy determinations are entirely an affair of the lawmaking body. If the legislature may convene itself, perhaps it should be forced to do so if there are problems the members feel need solution, but which are secondary in importance to those submitted by the governor.

Third, and finally, the limitation of business at special sessions tends to enable legislators to operate more freely and efficiently. An elected representative, if he desires re-election, pays heed to the wishes of his constituents during special sessions as well as regular sessions. This means that he must deal with special interest groups who want certain legislation introduced. If the legislature were not limited to the subjects mentioned in the call, the conscientious legislator would be subjected to great pressure during a special session. He would be forced either to say no to a powerful constituent who is not likely to be understanding, or to introduce a measure which stands a poor chance of receiving proper consideration and which may divert the legislature's attention from more critical matters. The call provides a ready answer to the legislator's dilemma ("The constitution says I cannot introduce your bill at this session."), and at the same time protects the legislature from itself by precluding the mass introduction of bills in a session severely pressed for time and supposedly devoted to a special purpose.

CONCLUSION

Even if it be concluded that the practical advantages of limiting the business of the legislature at special session do not justify the constitutional provision there is probably little possibility that constitutions will be revised to eliminate the provision. There is certainly no "groundswell" movement afoot among the people to remove restrictions on business at special sessions. Most of the objections have come from theoreticians.¹¹⁶

¹¹⁵ *Smith v. Curran*, 268 Mich. 366, 256 N.W.453 (1934).

¹¹⁶ See note 100 *supra*.

The best answer probably is that promulgated by the majority of courts which adopt a very liberal construction of the call. Their position operates as a suitable adjustment between having no limitation at all and unduly hamstringing the legislative body. It is unquestionable that constitutional mandates should not be taken lightly. The provision should not be stretched beyond reason, thereby destroying the purpose intended for it by the framers. But application of the liberal approach to the call is not likely to abrogate this purpose, nor is it likely to cause any diminution in the rights of the people.

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